Supreme Court, U. S.
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79-1119

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79--

AMERICAN INTERINSURANCE EXCHANGE,
Petitioner,

versus

T. P. HILDEBRAN, RONALD P. HILDEBRAN, WALKER TRUCKING COMPANY, INC., COMMERCIAL UNION ASSURANCE COMPANY, ROSEMARY MAZUR, and CARLTON DEANE, Respondents, of whom COMMERCIAL UNION ASSURANCE COMPANY was Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE PETITIONER PRAYS that a Writ of Certiorari be issued to review the Opinion of the United States Court of Appeals for the Fourth Circuit entered

in the above case on September 12, 1979.

OPINIONS BELOW

The judgment of the District Court for the District of South Carolina is unreported but is printed in Appendix I hereto. The Opinion of the Court of Appeals for the Fourth Circuit is reported at 605 F.2d 731. (Appendix II) The Opinion of the Court of Appeals for the Fourth Circuit was made and entered on September 12, 1979. A Petition for Rehearing was denied on October 23, 1979. (Appendix III)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Did the Court below err in not holding that the applicable South

Carolina Public Service Commission Regulations, South Carolina Public Service Commission Rules; Section 9 (Appendix IV); and the Lease entered into pursuant to said Regulations, operate to make the insurance policy of Commercial Union Assurance Company (Lessee's insurance) primary as a matter of law?

(2) Did the Court below err in failing to address exclusion (c) of the American Interinsurance Exchange policy in light of its finding that Walker is an additional insured under the American Interinsurance Exchange (hereinafter "AIE") policy and thereby leave unanswered the ultimate question of whether American Interinsurance Exchange policy affords any coverage under these circumstances?

(3) Did the Court below err in not addressing the exact nature of Commercial Union's obligations to Ronald P. Hildebran as an insured under its policy, in light of Commercial Union's negotiation of Covenants Not To Sue excluding Ronald P. Hildebran from the protection of those agreements?

(4) Did the Court below err in finding that AIE must indemnify Commercial Union for sums that it has expended in defending Walker and for the sum, up to the limits of the AIE policy, which Commercial Union has paid or will pay to settle the pending tort actions against the Lessee? This question arises because Commercial Union has failed to obtain releases for Ronald P. Hildebran in the various tort actions pending in the State and Federal Courts, and the

ordered indemnification would exhaust the policy limits of American Interinsurance Exchange's coverage.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

This Petition is not based upon any Federal Regulations per se, as it involves the Regulations of the Public Service Commission of the State of South Carolina; but the Court's attention is invited to the Regulations of the Interstate Commerce Commission. 49 U.S.C. Section 315 (1977); 49 C.F.R. Section 1043.1(a) (1977).

STATEMENT

There are suits pending in the Court of Common Pleas for the State of South Carolina and in the United States District Court for the State of South Carolina arising out of a three-vehicle

collision in 1975. One such vehicle was a 1975 Kenworth Tractor (truck) owned by T. P. Hildebran and leased to Walker Trucking Company, Inc. (Walker), which was pulling a trailer owned by Walker. The Lease was entered into pursuant to and in satisfaction of the Public Service Commission Regulations for the State of South Carolina. As provided in the Lease, the driver of the truck had been furnished to Walker by the Lessor, but his wages were paid and his activities were directed by Walker.

At the time of the collision, T. P. Hildebran carried a liability insurance policy on the truck. Issued by AIE, the policy had limitations of Fifteen Thousand and No/One-Hundredths ($15,000.00) Dollars bodily injury to

any one person, Thirty Thousand and No/One-Hundredths ($30,000.00) Dollars for bodily injury sustained in any one accident, and Five Thousand and No/One-Hundredths ($5,000.00) Dollars for property damage.

The American Interinsurance Exchange policy defined "an insured" to include "the named insured", T. P. Hildebran, as well as

> ... any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or . . . with . . . [his] . . . permission . . . .

The policy further provided that:

> If the insured has other insurance against a loss covered by this policy . . . [AIE] . . . shall not be liable under this policy for a greater proportion of such loss than the applicable limits of liability stated in the declarations bears to the total applicable

> limit of liability of all valid and collectible insurance against such loss.

The policy further provided that it does not apply;

> (c) Under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company; . . . .

The Commercial Union policy defined an insured to include Walker Trucking Company, Inc., and

> . . . any other person while using . . . a hired automobile with permission of the named insured, provided his actual operation . . . thereof is within the scope of such permission . . . .

The policy further excluded from the coverage thereof "the owner . . . of a hired automobile . . . or any agent or

employee of such owner . . . ." The policy also provided that "with respect to a hired automobile . . . this insurance shall be excess insurance over any other valid and collectible insurance available to the insured."

American Interinsurance Exchange instituted this action for declaratory judgment as to the responsibilities of the two insurance carriers relative to the negligence actions filed by the occupants of the car. Since that time, actions have been filed on behalf of the owner and driver of the second truck involved in the three-vehicle collision. A stipulation was entered into narrowing the questions presented to the District Court as follows:

1. Which policy of insurance

should provide the liability for T. P. Hildebran, Ronald P. Hildebran (the driver) and Walker Trucking Company, Inc., and

2. Should the "Covenant Not To Sue" executed between two of the Plaintiffs in the tort actions and Walker Trucking Company, Inc. be allowed to stand as valid and binding in light of the possible prejudicial effect upon T. P. Hildebran and American Interinsurance Exchange resulting from their lack of opportunity to participate in settlement negotiations.

The District Court concluded that there was no basis upon which the tort Plaintiffs could establish any liability on the part of T. P. Hildebran, owner of the truck; that American Interinsurance Exchange was relieved of any duty to the

remaining tort Defendants by reason of certain Regulations of the South Carolina Public Service Commission and certain provisions of the written Agreement for the lease of the truck; that by the express terms of its policy issued to Walker, Commercial Union was exclusively responsible for the coverage of the Lessee and the driver.

As to the second question, the District Court ruled that the "Covenants Not To Sue" protected only Walker, the Lessee of the truck, with the result that Commercial Union was not relieved of its duty to defend the truck driver.

Commercial Union appealed to the Court of Appeals for the Fourth Circuit which held that both American Interinsurance Exchange and Commercial Union

owe coverage to the driver of the truck for any liability which may be assessed against him; moreover, the Lessee, Walker, is entitled to coverage under American Interinsurance Exchange's policy as an additional insured; American Interinsurance Exchange's coverage of both the driver and the Lessee is primary and that of Commercial Union is excess. The Court of Appeals further held that American Interinsurance Exchange must indemnify Commercial Union for the sums that it has expended in defending Walker, and for sums up to the limits of the American Interinsurance Exchange policy, that Commercial Union has paid or will pay to settle the negligence actions against the Lessee. The Appeals Court affirmed the District Court in its finding that the "Covenants Not To Sue"

are only binding between the parties thereto and thus Commercial Union is not relieved of its duty to defend the driver of the truck.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it ignores the clear intent of the Public Service Commission Regulations of the State of South Carolina which had the force and effect of statutory law; it further ignores the clear intent of the lease agreement between T. P. Hildebran and Walker, and it ignores the circumstances and facts surrounding the issuance of Commercial Union's policy. Accordingly, the Fourth Circuit Court of Appeals has decided an important State question in a way contrary to the policies outlined in State law. Therefore, the Court should

review the decision pursuant to Supreme Court Rule 19.

The Rules and Regulations issued by the South Carolina Public Service Commission pursuant to the South Carolina Motor Vehicle Carrier Law which were in effect at the times material to this controversy provided in part:

> Rule 99.(e) Any lease of motor vehicle equipment by any person shall comply with the following conditions:
>
> (6) Every lease shall provide for the exclusive possession, control, and use of the equipment and for the complete assumption of responsibility in respect thereto by the Lessee for the duration of said Lease.

Rule 99.(d) Every vehicle subject to lease shall be covered by adequate insurance as required by these rules:

> Such insurance shall be in the name of the Lessee and evidence of coverage must be filed with the Commission. [See Appendix IV]

The Motor Equipment Lease and Agreement, dated October 28, 1974, between T. P. Hildebran, owner-Lessor of the 1975 Kenworth Tractor, and Walker Trucking Company, Inc., Lessee, reads, in relevant part, as follows:

> 3. During the period of this Lease the said motor vehicle equipment [tractor] shall be solely and exclusively under the direction and control of the Lessee [Walker Trucking Company, Inc.], and the Lessee shall be liable . . . for any property damage that may be caused by the operation of the said motor vehicle equipment by the Lessee, and for any public liability resulting from said operation by the Lessee . . . .
>
> 4. It is mutually agreed and understood by Lessor [T. P. Hildebran] and the Lessee [Walker Trucking Company, Inc.] that whenever the motor vehicle equipment [tractor] is disengaged from Lessee's trailer equipment [tank] the Lessor shall become an independent contractor no longer under the control or direction of Lessee, and it is further agreed and understood that during the time that said equipment

> is separated, as aforesaid, that the Lessee's Public Liability and Property Damage Insurance shall not cover Lessor's motor vehicle equipment [tractor]. However, the above does not apply when Lessor is instructed to do so by Lessee.

Before a tractor owner may haul a trailer for commercial purposes in the State of South Carolina, he must obtain a Certificate of Public Convenience and Necessity. South Carolina Code Annotated, Section 58-23-40 [1976]. T. P. Hildebran had no such Certificate but Walker Trucking Company, Inc. did. Walker operating pursuant to the Certificate of Public Convenience and Necessity was responsible for insuring all vehicles operating as part of its fleet and had to provide a Certificate of Insurance to the Public Service Commission as evidence of that fact. Thus,

Walker had to procure insurance to cover the leased vehicle. T. P. Hildebran in the Lease Agreement was called upon as part of the basis of the bargain to do those things necessary to keep in force the insurance coverage of Commercial Union.

The Lease Agreement discloses that Walker Trucking Company, Inc. was aware of all the requirements of both the Interstate Commerce Commission and the South Carolina Public Service Commission and that the Lease Agreement was drafted to comply with those Regulations. It is axiomatic that the Regulations of the Public Service Commission for the State of South Carolina and the Interstate Commerce Commission have the same objective, this is, protection of the public.

Accord Interstate Commerce Act, Section 204(e), 49 U.S.C.A. Section 304(e). Consequently, the cases that make insurers of truck lessees primarily liable as a matter of public policy and law are directly on point to the question herein. See Hagans v. Glens Falls Insurance Co., 465 F.2d 1249 (10th Cir. 1972); Argonaut Insurance Co. v. National Indemnity Co., 435 F.2d 718 (10th Cir. 1971); Aetna Casualty And Surety Co. v. Arkin (N.D. Ill. 1973); Allstate Insurance Co. v. Federal Insurance Co., 23 Md.App. 105, 326 A.2d 29 (1974) modified on other grounds 341 A.2d 399 (1975).

The very compelling reason that the decision below should be reviewed is that there is a difference of opinion

among the Supreme Courts of the various states and the various Circuit Courts of Appeal as to the effect to be given to Public Service Commission Regulations and Interstate Commerce Commission Regulations in cases such as this. Compare, Hagans v. Glen Falls Insurance Co., 465 F.2d 1249 (10th Cir. 1972); Argonaut Insurance Co. v. National Indemnity Co., 435 F.2d 718 (10th Cir. 1971); Aetna Casualty And Surety Co. v. Arkin, (N.D. Ill. 1973); Allstate Insurance Co. v. Federal Insurance Co., 23 Md.App. 105, 326 A.2d 29 (1974) modified on other grounds 341 A.2d 399 (1975); [all holding regulations and public policy make the insurance for the truck lessee primary as a matter of law]; with American Interinsurance

Exchange v. Hildebran, 605 F.2d 731 (4th Cir. 1979); Carolina Casualty Insurance Co. v. The Insurance Co. of North America, 595 F.2d 128 (3rd Cir. 1979); Carolina Casualty Insurance v. Underwriters Insurance Co. (5th Cir. 1978); National Mutual Insurance Co. v. Liberty Mutual Insurance Co., 196 F.2d 597 (D.C. Cir. 1952); Marwell Construction Inc. v. Underwriters At Lloyds, London, 465 P.2d 298 (Alaska 1970); and Ryder Truck Lines Inc. v. Carolina Casualty Insurance Co., 385 N.E.2d 449 (Ind. 1979); [all holding regulations and public policy do not make lessee's insurance primary as a matter of law].

2. The Court below was inconsistent and created an entirely new issue to be resolved. The Court first found

that none of the exclusions in the American Interinsurance Exchange policy relieved its insured of liability. The Court thereafter found that Walker was afforded coverage under the AIE policy as an additional insured and in so doing, has made a finding of fact which clearly comes within the exclusion (c) of the AIE policy. Exclusion (c) provides that the policy does not apply while the automobile (Hildebran's truck) is used for towing of any trailer owned or hired by the insured (Walker's trailer) and not covered by like insurance in the company; or while any trailer covered by the policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company.

It is clear from the record that

AIE did not issue a policy of insurance on Walker's trailer and it is a trailer owned by an insured under the Court's finding that Walker is an insured. The Court has therefore breathed life into exclusion (c) of the AIE policy and the Court by holding that exclusion (c) is inapplicable has ignored the policy definition of "insured." This same exclusion was dealt with by the Fourth Circuit in Pennsylvania Threshermen & Farmers Mutual Casualty Insurance Co. v. Hartford Accident & Indemnity Co., 310 F.2d 618 (4th Cir. 1962). Although the earlier Fourth Circuit Opinion did not find the exclusion applicable to the facts therein, it appears that the present facts would trigger the exclusion. Thus, the lower

court has departed from earlier case law on this point.

3. The Court avoided the question inherently raised by its finding that Commercial Union owed a duty to defend Ronald P. Hildebran. The Court did not address the obligations that arise therefrom in light of Commercial Union's negotiation of "Covenants Not To Sue" excluding Ronald P. Hildebran from the protection of those agreements. There can be no authority offered by Commercial Union to support its reckless disregard of the rights of Ronald P. Hildebran as an insured under its policy. This is particularly significant because Commercial Union has paid its policy limits to one of the Plaintiffs in the personal injury suits (Mazur) while leaving at

risk Ronald P. Hildebran, one of its insured. It cannot be denied that Ronald P. Hildebran is entitled to the same protections under Commercial Union's policy as the named insured, Walker Trucking Company, Inc.

4. The Court below failed to instruct the Petitioner as to how it could indemnify Commercial Union up to the Petitioner's policy limits and still afford protection for Ronald P. Hildebran as an insured in the various tort actions pending. Since the Court of Appeals held that both policies of insurance were in effect at the time of the collision, Commercial Union should not be entitled to any indemnification for monies paid under the Covenants negotiated solely by Commercial Union without participation by AIE, all in

derogation of the duties and obligations owed to the insured, Ronald P. Hildebran.

This lack of clear guidance from the lower court as to the respective duties and obligations of the parties herein requires that this court exercise its power of supervision pursuant to Supreme Court Rule 19(1)b.

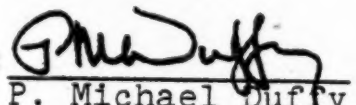
CONCLUSION

The question presented by this case as to the effect to be given conflicting provisions in insurance policies in light of Public Service Commission and Interstate Commerce Commission Regulations is of great and recurring significance in the various jurisdictions. In addition, there is a serious question of public policy involved, which is the frustration of the legislative intent,

expressed in the passage of the various Regulations.

For these reasons and those set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

HAWKINS & MORRIS

By: 

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January 16, 1980.

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Civil Action No. 76-10

AMERICAN INTERINSURANCE EXCHANGE,
Plaintiff,

versus

T. P. HILDEBRAN, RONALD P. HILDEBRAN, WALKER TRUCKING COMPANY, INC., COMMERCIAL UNION ASSURANCE COMPANY, ROSEMARY MAZUR, and CARLTON DEANE,
Defendants.

ORDER

The Plaintiff's Complaint in this cause of action seeks a declaratory judgment as to the responsibilities of two insurance carriers arising out of two separate causes of action docketed on the Jury Calendar of this Court; one case being Civil Action No. 75-2200 in

which Rosemary Mazur is the plaintiff, and Ronald P. Hildebran, T. P. Hildebran and Walker Trucking Company, Inc., are defendants; and the other case being Civil Action No. 75-2198 in which Carlton Deane is the plaintiff and Ronald P. Hildebran, T. P. Hildebran and Walker Trucking Company, Inc., are defendants. Both of those plaintiffs are non-residents of this State and seek damages arising out of the three-vehicle collision in which Rosemary Mazur was the owner-passenger in an automobile being driven by Carlton Deane. Both allegedly sustained injuries as a result of a collision with a 1973 White Truck driven by one Tommy C. Kinard which had previously collided with a 1975 Kenworth truck leased and operated by Walker Trucking Company, Inc. The lessor was

T. P. Hildebran. Ronald P. Hildebran (working for Walker Trucking Company, Inc., pursuant to the lease agreement), was the driver or operator of said vehicle at the time of the collision.

As a result of the claims of the plaintiffs, Mazur and Deane, the plaintiff in this action, American Interinsurance Exchange (hereinafter referred to as "AIE") filed its Complaint dated January 2, 1976, joining as defendants the parties to the initial causes and Commercial Union Assurance Company, (hereinafter referred to as "Commercial Union"), which is the liability insurance carrier for Walker Trucking Company, Inc. The plaintiff "AIE" is the liability insurance carrier for the lessor, T. P. Hildebran.

The defendants, Rosemary Mazur and Carlton Deane, have filed their Answer dated January 27, 1976. The defendant, Commercial Union, filed its Answer on March 25, 1977.

At the request of counsel for the parties involved, stipulations were filed in this case and the case is presently before this court for final disposition without the necessity of a jury trial. The Stipulations of Fact were filed on September 19, 1977, and are attached as Exhibit "A". AIE, through its counsel, had previously filed its brief in the form of a proposed Order. On October 19, 1977, a hearing was held in this cause in Charleston, South Carolina, at which time the following attorneys were pre-

sent: Falcon B. Hawkins for AIE; James A. Bell for Mazur and Deane; and Thornwell F. Sowell, III, for Commercial Union. At that hearing Mr. Sowell requested the opportunity to file a brief. That brief was filed on October 31, 1977 and the court has also received a letter from Mr. Sowell dated December 28, 1977, which supplemented his brief. Mr. Bell has stated he has no desire to file a brief.

One error in the Stipulation of Facts must be pointed out for clarification. The Stipulation reads, in paragraph 1, as follows: "The first Civil Action is No. 75-220 in which Rosemary Mazur is the plaintiff and Ronald P. Hildebran and Walker Trucking Company, Inc., are defendants." It is

clear from the case file in that cause of action that T. P. Hildebran is also a defendant in that case and he will be so considered in this Order.

As a preliminary matter the court finds as follows:

1. That this action is properly before the court pursuant to 28 U.S.C. Sec. 2201 to determine various rights, duties and liabilities of the parties under the terms and provisions of two respective insurance policies.

2. That all parties are properly within the jurisdiction of the court as is the subject matter of this action.

3. That the matter in controversy, exclusive of interests and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

As per the Stipulations of Fact,

the first question presented for determination is:

1. Which policy of insurance should provide the liability insurance coverage for T. P. Hildebran, Ronald P. Hildebran and Walker Trucking Company, Inc.?

This court finds that the responsibility for providing liability insurance coverage and the responsibility for defending claims against Ronald P. Hildebran and Walker Trucking Company, Inc., lies exclusively with the defendant, Commercial Union.

In the case of Walker Trucking it appears without question that both the Public Service Commission Rules and Regulations, as well as the terms of the lease, would dictate this result.

The Rules and Regulations in effect

at the times material to this controversy issued by the South Carolina Public Service Commission, pursuant to the South Carolina Motor Vehicle Carrier Law, Chapter 13, Sections 58-1401 through 1501, and Section 58-1536 (Volume 12) Code of Laws of South Carolina 1962 (now 58 S. C. Code, Sec. 23-10, et seq. (1976)) provide in part:

> Rule 99.(d) Every vehicle subject to lease shall be covered by adequate insurance as required by these Rules: such insurance shall be in the name of the lessee and evidence of coverage must be filed with the Commission. (Emphasis added).

Rule 99.(e) Any lease of motor vehicle equipment by any person shall comply with the following conditions:

(6) Every lease shall provide for the exclusive possession, control, and use of the equipment and for the complete assumption of responsibility in respect thereto by the lessee for the duration of

said lease. (Emphasis added).

These Rules and Regulations of the Public Service Commission have the force and effect of statutory law. See 1962 S. C. Code, Sec. 58-1461; 58 S. C. Code, Sec. 23-1010 (1976); see, Heyward v. South Carolina Tax Commission, 126 S.E. 2d 15, 19, 20; 240 S.C. 347 (1962).

The Motor Equipment Lease and Agreement, dated October 28, 1974, made between T. P. Hildebran, owner-lessor of the 1975 Kenworth tractor, and Walker Trucking Company, Inc., lessee, read in relevant part as follows:

> 3. During the period of this lease the said motor vehicle equipment (tractor) shall be solely and exclusively under the direction and control of the Lessee (Walker Trucking Company, Inc.), and the Lessee shall be liable . . . for any property damage that may be

> caused by the operation of the said motor vehicle equipment by the Lessee, and for any public liability resulting from said operation by the Lessee . . . . (Emphasis added).
>
> 4. It is mutually agreed and understood by Lessor (T. P. Hildebran) and Lessee (Walker Trucking Co., Inc.) that whenever the motor vehicle equipment (tractor) is disengaged from Lessee's trailer equipment (tank) the Lessor shall become an independent contractor and no longer under the control or direction of Lessee, and it is further agreed and understood that during the time that said equipment is separated, as aforesaid, that the Lessee's Public Liability and Property Damage Insurance shall not cover Lessor's motor vehicle equipment (tractor). However, the above does not apply when Lessor is instructed to do so by Lessee. (Emphasis added).

Read in connection with paragraph 3 of the lease, paragraph 4 of the lease says by negative implication that Lessee Walker's Public Liability and Property Damage Insurance will cover Lessor

Hildebran's tractor when the tractor and trailer are engaged.

The clear command of the above Rules and the assumption in the lease of total control and responsibility by the Lessee Walker lead this court to conclude that Walker and Commercial Union have the responsibility to compensate any persons injured by the use of the 1975 Kenworth tractor-trailer combination. It is also concluded that AIE has no coverage of, nor owes any defense to Walker Trucking.

Commercial Union also has coverage over as well as a duty of defending Ronald P. Hildebran, as a person using a hired automobile with the permission of the named insured. He is thus an insured under the Omnibus Clause of Com-

mercial Union's policy, which provides as follows:

> II. Persons Insured
>
> Each of the following is an insured under this insurance to the extent set forth below:
>
> (a) the named insured
> (b) (inapplicable)
> (c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . .
> .
>
> None of the following is an insured:
>
> (ii) the owner . . . of a hired automobile . . . or any agent or employees of any such owner . . .

Commercial Union asks this Court to determine that its policy affords no coverage to Ronald P. Hildebran because of the exception set forth above and

cites Canal Insurance Co. v. Liberty Mutual Insurance, 395 F.Supp. 962 (N.D. Ga. 1975). Even assuming arguendo that Ronald P. Hildebran was an employee of T. P. Hildebran, and not an employee of Walker Trucking, the decision cited by Commercial Union is not properly addressed to our present inquiry. The district court decision in Canal that liability insurance coverage was not afforded to the driver of the truck involved in an accident was predicated on the court's conclusion that the "truck was not a 'hired automobile' under the terms of the Liberty Mutual policy because there was no separate hiring contract." There is no dispute in the facts of the instant case and thus the Canal Insurance Company

decision loses any persuasion it might have in reference to the issue here.

From the facts of this case, the court finds that Ronald P. Hildebran was an employee of Walker Trucking at the time of the accident and he is therefore afforded coverage and owed a defense by Commercial Union under the provisions of its policy. This court also finds that AIE owes no defense and has no coverage over Ronald P. Hildebran because of the previously-mentioned Public Service Commission Regulations and the lease agreement entered between Walker Trucking and T. P. Hildebran.

The court finds no basis under the facts of this case upon which the two plaintiffs in the two tort actions pending in this court could establish

any liability on the part of T. P. Hildebran, the owner of the 1975 Kenworth truck. The Public Service Commission Rules and Regulations, supra, and paragraph 3 of the Lease between T. P. Hildebran and Walker Trucking, supra, completely absolve T. P. Hildebran from any liability to Mazur and Deane under the facts of this case.

The second question presented in the Stipulation for this court's consideration is:

"2. Should the Covenants Not to Sue executed between Rosemary Mazur, Carlton Deane and the Walker Trucking Company, Inc., be allowed to stand as valid and binding in light of possible prejudicial effect upon T. P. Hildebran and American Interinsurance Exchange

resulting from their lack of opportunity to participate in settlement negotiations?"

The court concludes that the Covenants Not to Sue are binding only between the parties who executed them, and these covenants do not relieve Commercial Union of the duty under its policy to defend any insureds, including Ronald P. Hildebran, who was driving the truck in question with the permission of, and while acting within the scope of his employment with, Walker Trucking Company, the named insured in said policy.

Therefore, it is hereby ORDERED:

(1) That the responsibility for providing liability insurance coverage and the responsibility for defending claims against Ronald P. Hildebran and

Walker Trucking Company, Inc., lies exclusively with the defendant, Commercial Union.

(2) The defendant AIE owes no coverage over nor does it owe any defense to Walker Trucking Company or Ronald P. Hildebran.

(3) That under the facts of this case there is no liability on the part of T. P. Hildebran for the damages incurred by Mazur and Deane.

(4) The Covenants Not to Sue are binding only between the parties who executed them and do not relieve Commercial Union of its duty to defend any insureds under its policy.

AND IT IS SO ORDERED.

s/Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Charleston, S. C.
January 30, 1978.

APPENDIX II

AMERICAN INTERINSURANCE EXCHANGE, Appellee,

v.

COMMERCIAL UNION ASSURANCE COMPANY, Appellant,

and

T. P. Hildebran, Ronald P. Hildebran, Walker Trucking Company, Inc., Rosemary Mazur and Carlton Deane, Defendants.

No. 78-1196

United States Court of Appeals, Fourth Circuit.

Argued Jan. 9, 1979.

Decided Sept. 12, 1979.

FIELD, Senior Circuit Judge:

A 1975 Kenworth tractor (truck) owned by T. P. Hildebran and leased by him to Walker Trucking Company, Inc. (Walker), was involved in a collision with an automobile in South Carolina in 1975 while pulling a trailer owned by

Walker. As provided in the lease the driver of the truck had been furnished to Walker by the lessor, but his wages were paid and his activities were directed by Walker. Alleging that the truck had been negligently operated, two occupants of the car brought diversity actions for damages against the driver, the truck owner, and the lessee.[1]

At the time of the collision, T. P. Hildebran carried a liability insurance policy on the truck. Issued by American Interinsurance Exchange (AIE), the policy had limitations of $15,000 for bodily injury to any one person, $30,000 for bodily injury sustained in any one accident, and $5,000 for property damage. The AIE policy defined "an insured" to include "the named insured," T. P. Hildebran, as well as

> any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or * * * with * * * [his] * * * permission * * *.

The policy further provided that

> [i]f the insured has other insurance against a loss covered by this policy * * * [AIE] * * * shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss * * *.

Liability insurance was also carried by Walker, the lessee. Issued by Commercial Union Assurance Company (Commercial Union), this insurance has bodily injury limits of $100,000 per person and $300,000 per accident, with a property damage limit of $100,000. The Commercial Union policy defined "an insured" to include Walker Trucking Company, Inc., and

> any other person using * * * a hired automobile with the permission of the named insured, provided his actual operation * * * thereof is within the scope of such permission * * *.

Expressly excluded from the coverage of the Commercial Union policy was "the owner * * * of a hired automobile * * * or any agent or employee of any such owner * * *." The policy further stated that "[w]ith respect to a hired automobile * * *, this insurance shall be excess insurance over any other valid and collectible insurance available to the insured."

AIE brought this action for a declaratory judgment as to the responsibilities of the two insurance carriers relative to the negligence actions filed by the occupants of the car. A stipulation between the parties narrowed the questions presented for the district court's

determination as follows: (1) Which policy of insurance should provide the liability for T. P. Hildebran, Ronald Hildebran [the driver] and Walker Trucking Company, Inc., and (2) Should the "Covenants Not to Sue" executed between Rosemary Mazur, Carlton Deane [plaintiffs in the tort action] and the Walker Trucking Company, Inc., be allowed to stand as valid and binding in light of the possible prejudicial effect upon T. P. Hildebran and American Interinsurance Exchange resulting from their lack of opportunity to participate in settlement negotiations.

Upon agreed facts, the district court concluded, as to the first question, that there was no basis upon which the tort plaintiffs could establish any liability on the part of the owner of the

truck; that AIE was relieved of any duty to the remaining tort defendants by reason of certain regulations of the South Carolina Public Service Commission and certain provisions of the written agremeent for the lease of the truck; and that by the express terms of its policy issued to Walker, Commercial Union was exclusively responsible for the coverage of the lessee and the driver. With respect to the second question, the court ruled that the "Covenants Not to Sue" protected only Walker, the lessee of the truck, with the result that Commercial Union was not relieved of its duty to defend the truck driver.

From a memorandum order incorporating these rulings,[2] Commercial Union appeals.[3] It is appellant's position that the court below should have dis-

regarded the Public Service Commission regulations and the terms of the lease, and should have found from the express terms of the policies of insurance that AIE, not Commercial Union, is exclusively responsible for the truck driver's liability. Alternatively, Commercial Union maintains that even if it must afford the driver some coverage, that coverage is excess which is not to come into play until the limits of liability stated in the AIE policy are exhausted. Finally, appellant contends that the policy issued by AIE to the truck's owner covers Walker also. Commercial Union, therefore, seeks indemnity from AIE, as the primary insuror, for expenses incurred in defending the lessee and for sums, up to the limits of the AIE policy, that Commercial Union has paid or will pay to

settle the negligence actions against the lessee.[4]

[1] We hold that both AIE and Commercial Union owe coverage to the driver of the truck for any liability which may be assessed against him. Moreover, the lessee, Walker, is also entitled to coverage under AIE's policy as an additional insured.[5] AIE's coverage of both the driver and the lessee is primary and that of Commercial Union is excess. Therefore, AIE must indemnify Commercial Union for the sums it has expended in defending Walker, and for sums, up to the limits of the AIE policy, that Commercial Union has paid or will pay to settle the negligence actions against the lessee. Furthermore, we agree with the district court that the "Covenants Not to Sue" are only binding between the parties thereto,

and, thus, Commercial Union is not relieved of its duty to defend the driver of the truck. Accordingly, we affirm the court below on the latter point, but remand the case for the entry of a declaratory judgment which incorporates our conclusions on the other issues.[6]

I.

[2,3] When a dispute arises as to whether an insurance company shall be required to cover a given loss, the written insurance contract must first be consulted to ascertain the precise contours of the duties undertaken by the insurer. Like contracts in general, the insurance agreement must be enforced according to its terms. Torrington Co. v. Aetna Casualty & Surety Co., 264 S.C. 636, 216 S.E.2d 547, 550 (1975); Quinn v. State Farm Mutual Automobile Insurance

Co., 238 S.C. 301, 120 S.E.2d 15 (1961).

[4] Upon a fair reading of the language of the insurance policies issued by AIE to T. P. Hildebran and by Commercial Union to Walker Trucking Company, Inc., it is clear that each policy affords liability coverage to the driver of the truck. For its part, AIE conceded as much at oral argument.[7] The AIE policy expressly insured persons using the truck with the permission of the named insured, and it is undisputed that T. P. Hildebran himself appointed the man who was operating the vehicle for Walker at the time of the accident.[8] While the insurance agreement contained certain exclusions from coverage upon which AIE relied in the court below,[9] no such argument is raised on appeal. Nevertheless, none of the exclusions, fairly construed, relieve

the insured of the liability it contractually assumed for damages resulting from the driver's negligence.[10]

[5] A closer question is whether, by its terms, the Commercial Union policy issued to the trucking company also protected the driver. There is no doubt that the driver fit the description of "an insured" under the omnibus clause providing for coverage of persons using a hired automobile with the permission of the named insured; the truck was admittedly a hired automobile, and counsel for Commercial Union conceded in oral argument that the driver was an employee of Walker, and subject to its direction and control when the collision occurred.[11] As previously noted, however, the Commercial Union policy also expressly stated that an "agent or employee" of the

owner of a hired vehicle was not to be considered an insured under the contract of insurance. Appellant argues that by virtue of this exclusionary provision the driver was outside the protection of the Commercial Union policy. Even though he was an employee of Walker, Appellant contends that certain provisions of the written agreement for the lease of the truck show that at the time of the accident the driver was the employee of T. P. Hildebran as well. Specifically, Commercial Union emphasizes that the truck's owner agreed in the lease to choose the driver, maintain coverage for him under Workmen's Compensation, and to accept some reimbursement for his services.

Even if the driver was an employee of the owner, however, we are of the

opinion that the exclusionary provision of the Commercial Union policy does not exclude him from coverage. As written, the exclusionary provision can reasonably be construed to apply only where the owner, and not the lessee, is the driver's employer. See Carolina Casualty Insurance Co. v. Underwriters Insurance Co., 569 F.2d 304 (5 Cir. 1978); Wellman v. Liberty Mutual Insurance Co., 496 F.2d 131 (8 Cir. 1974); Trinity Universal Insurance Co. v. Farmers Mutual Automobile Insurance Co., 309 F.2d 283 (7 Cir. 1962); and Oil Base Inc. v. Transport Indemnity Co., 143 Cal.App.2d 453, 299 P.2d 952 (1956). We are of the opinion that where, as here, the driver is also the employee of the lessee, the "hired auto" exclusion is inapplicable. This construction is consistent with the

policy of construing ambiguities in favor of coverage. Gaskins v. Blue Cross-Blue Shield of S. C., 245 S.E.2d 598, 600 (S.C. 1978); Beckett v. Jefferson Standard Life Insurance Co., 165 S.C. 481, 164 S.E. 130 (1932).

In regard to the lessee of the truck, it is undisputed that Commercial Union owes coverage to Walker as its named insured. In addition, a review of the policy issued by AIE reveals that it covers the lessee as well. As stated earlier, the definition of "an insured" includes "any person or organization legally responsible for the use * * * [of the automobile]." By virtue of the lease agreement between T. P. Hildebran and Walker [12] and the regulations of the Public Service Commission,[13] Walker is vicariously liable for the negligent use

of the truck. Accordingly, it is inescapable that the lessee is an insured under the AIE policy.

II

[6] Since both AIE and Commercial Union afford coverage to the driver and the lessee, it is necessary that we determine which policy shall provide primary coverage and which shall be excess. As recited earlier, the Commercial Union policy states that with respect to a hired automobile such insurance shall be excess. On the other hand, the policy issued by AIE provides that its coverage be pro rated with other valid and collectible insurance. In an identical situation, we have held that the policy containing the excess clause does not constitute other valid and collectible insurance, and thus the pro

rata policy shall be primary. American Surety Company of New York v. Canal Insurance Co., 258 F.2d 934 (4 Cir. 1958) (See cases cited therein).

The appellee contends, however, that the Public Service Commission regulations requiring the lessee to obtain liability insurance in his name operates to make the lessee's insurance primary as a matter of law. We cannot agree. The regulations in question merely insure that viable insurance will be available to innocent victims of automobile accidents. They in no way require that such insurance shall be primary over other available insurance. We conclude, therefore, that Canal is controlling and as such AIE's coverage is primary and Commercial Union's is excess.

AFFIRMED IN PART: REVERSED IN PART, AND REMANDED.

FOOTNOTES TO OPINION

1 The negligence actions are apparently still pending. They are only tangentially related to this appeal and we, of course, intimate no view as to their merits.

2 American Interinsurance Exchange vs. Hildebran, 444 F.Supp. 1248 (D.S.C.1978).

3 All parties to the tort actions were also parties to this declaratory judgment, but none of them has appealed.

4 These points were raised in the district court by Commercial Union's answer to AIE's amended complaint.

5 Commercial Union, of course, owes coverage to Walker as its named insured.

6 Appellant does not contest the district court's determination that the owner-lessor of the truck cannot be found liable for any damages suffered by the tort plaintiffs, and we do not address that aspect of the judgment.

7 The appellee conceded to this court that the driver was covered by its policy and thus the only issue as to him is which policy provides

primary coverage.

8 The lease provides:

> Lessor will furnish one or more competent drivers which will meet all requirements of the Interstate Commerce Commission, Public Service Commission, State and Federal law enforcement agencies and Insurance Companies as may be required by Lessee.

9 Exclusion (b) provides that the policy does not apply to the liability assumed by the insured under any contract or agreement, etc.

Exclusion (c) provides that the policy does not apply while the automobile is used for towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by the policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company.

Exclusion (f) provides that the policy does not apply to injury to or destruction of property owned or transported by the insured, or property rented to or in charge of the insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by the policy.

10 Exclusion (b) is inapplicable because the insured has not "assumed"

any liability under any contract or agreement. Any liability on the part of the owner or the driver could only arise as a result of the latter's negligence.

Exclusion (c) is inapplicable because the tractor was not used for the towing of a trailer owned or hired by the insured since the trailer in question was owned not by the insured, T. P. Hildebran, but by Walker Trucking. As to the second clause of exclusion (c), even if AIE's policy covers trailers, the trailer would be used with an automobile "owned by the insured" and the automobile would be specifically covered by the AIE policy, and thus would not fulfill the "and not covered by like insurance in the company" requirement.

Exclusion (f) is inapplicable because it only refers to property owned, transported, rented to or in charge of the insured. It does not apply to property of third persons.

11 The lease provides:

> During the period of this lease the said motor vehicle equipment shall be solely and exclusively under the direction and control of the Lessee * * *

The lease further provides:

> It will be mutually understood and agreed that the above specified

equipment shall be operated in accordance with Lessee's safety regulations and under its safety supervision.

Moreover, the appellant conceded that the driver might very well have been a statutory employee of the lessee.

12 The lease provides:

> During the period of this lease the said motor vehicle equipment shall be solely and exclusively under the direction and control of the Lessee, and the Lessee shall be liable * * * for any public liability resulting from said operation by the Lessee.

13 The regulations provide in part:

> Rule 99(e). Any lease of motor vehicle equipment by any person shall comply with the following conditions:
>
> (6) Every lease shall provide for the exclusive possession, control and use of equipment and for the complete assumption of responsibility in respect thereto by the lessee for the duration of said lease.
>
> Rule 99(d) Every vehicle subject to lease shall be covered by adequate insurance as required by these Rules; such insurance shall be in the name of the lessee and evidence of coverage must be filed with the Commission.

APPENDIX III

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1196

American Interinsurance Exchange,
Appellee,

versus

Commercial Union Assurance Co.,
Appellant,

and
T. P. Hildebran; Ronald P. Hildebran; Walker Trucking Co., Inc.; Rosemary Mazur and Carlton Deane,
Defendants.

O R D E R

Upon consideration of the petition for rehearing received October 1, 1979,

IT IS ORDERED that:

1. leave to file petition for rehearing out of time is

GRANTED;

2. petition for rehearing is

DENIED.

Entered at the direction of Judge Field for a panel consisting of Judge Winter, Judge Field and Judge Widener.

For the Court,

/s/ William K. Slate, II
Clerk

Filed
October 23, 1979

U.S. Court of Appeals
Fourth Circuit

APPENDIX IV

REGULATIONS OF SOUTH CAROLINA
PUBLIC SERVICE COMMISSION

SECTION 9. Lease and Subcontracts

Rule 92. The term "the transportation of property for compensation" shall mean any agreement, lease, subcontract or other device by which property is transported over the public highways of the State of South Carolina and under which any person or persons other than a private carrier shall have any right to control, direct or dominate such shipment or under which any person or persons, in substance, is engaged in the business of intrastate transportation of property and for which such person or persons shall receive payment in connection with the transportation of such property by a motor vehicle or for the use of a motor vehicle.

Rule 93. The term "private carrier" shall mean a person hauling his own products in his own motor vehicles or in motor vehicles which are leased in compliance with the terms of Rules Nos. 95 and 99.

Rule 94. The term "owner" shall include a person (1) to whom title to equipment has been issued, or (2) who as lessee, shall have the right to exclusive use of equipment, for a period of longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any State or States or the District of Columbia in his or its name.

Rule 95. No lease or subcontract shall preclude the parties thereto from complying with the provisions of Title

58, Chapter 13 of the Code of Laws of South Carolina (1962) or from the Rules and Regulations adopted pursuant thereto unless, by the terms thereof, such lease or subcontract shall comply with the following provisions:

(a) Any lease shall transfer sole control, direction and domination of the motor vehicle and the shipment or shipments involved to a private carrier, or to a carrier certificated by this Commission, or by the Interstate Commerce Commission.

(b) Any subcontract shall provide for services beyond those ordinarily and normally performed by common or contract carriers.

Rule 96. The following factors

shall be considered in determining whether sole control of a motor vehicle and the shipment or shipments involved have been transferred.

(a) Supervision--That person who, directly or indirectly, shall supervise or regulate the manner and method of shipment and the use of the motor vehicle or vehicles involved shall be presumed to have a right to control, direct or dominate such shipment.

(b) Employment and compensation of drivers--That person who, directly or indirectly, shall employ, discharge and/or compensate the drivers of any motor vehicle or vehicles, or

who shall have the right to influence the employment or compensation thereof, shall be presumed to have a right to control, direct or dominate any shipments transported thereby, except, that this presumption will not apply in the case of a long-term lease entered into by a common carrier of mobile homes.

Rule 97. (Omitted).

Rule 98. If any of the provisions of Rule 96 or Rule 97 create presumptions as specified therein, then the following additional factors shall be considered:

(a) Insurance--It shall be presumed that the party in whose name public liability and property

damage and/or cargo insurance is issued on any motor vehicle shall have a right to control, direct or dominate such motor vehicle and/or any shipments transported by it.

(b) Maintenance--It shall be presumed that the party who has the obligation and duty to maintain any motor vehicle or vehicles shall have a right to control, direct or dominate such motor vehicle.

(c) Number of Vehicles--The amount and type of vehicle equipment, owned directly or indirectly, will be regarded as evidence of whether or not any person is engaged in the business of intrastate transportation of

property for compensation. Any person owning in excess of five pieces of such equipment shall be presumed to be engaged in such transportation.

Rule 99. (a) No common or contract carrier may have more than one lease covering a specific piece of equipment in effect at a given time.

(b) No common or contract carrier shall lease vehicles to shippers or receivers.

(c) Each lessee shall properly identify each piece of equipment with appropriate external markings during the period of the lease as specified in these Rules.

(d) Every vehicle subject to lease shall be covered by adequate insurance as required by these Rules; such insur-

ance shall be in the name of the lessee and evidence of coverage must be filed with the Commission.

(e) Any lease of motor vehicle equipment by any person shall comply with the following conditions:

(1) A copy of the lease must be carried in the leased equipment at all times; or an appropriate Certificate or card, the form of which has been approved by the Commission, signifying that the equipment is leased and referring to the date and location of the lease, may be carried in lieu of said lease.

(2) Every such lease, certificate, or card, shall identify each

piece of equipment leased thereunder.

(3) Every such lease must be in writing and signed by the parties thereto or their regular employees or agents duly authorized to act for them.

(4) Every lease shall specify the time the lease begins and the time or circumstances on which it ends.

(5) Every lease shall set out the specific consideration or method of determining compensation.

(6) Every lease shall provide for the exclusive possession, control, and use of the equip-

ment and for the complete assumption of responsibility in respect thereto by the lessee for the duration of said lease.

(7) Every such lease shall require for safety purposes, the inspection of the equipment involved at the time of surrender of possession thereof by the lessor and lessee jointly, or their agents.

Rule 100. (Omitted).

Rule 101. (Omitted).